SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 194

LAWRENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, STERLING SUGARS SALES CORP., AND STERLING SUGARS, INC., A DELAWARE CORPORATION,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

CARL J. BATTER,
Counsel for Petitioners.

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Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioners, Lawrence M. Williams, as Liquidator of Sterling Sugars, Inc., formerly a Louisiana Corporation, Sterling Sugars Sales Corp., and Sterling Sugars, Inc., a Delaware Corporation, respectfully pray for a writ of certiorari to the Court of Claims of the United States to review the judgment of that Court entered in the above consolidated causes No. 45050 and 45654, on February 1, 1943.

The petitioners' motion for a new trial was overruled on May 3, 1943.

Opinion Below.

The opinion of the Court of Claims of the United States is reported at 48 F. Supp. 647 (R. 18). The petitioners'

motion for a new trial was overruled on May 3, 1943, and is reported at R. 23.

Jurisdiction.

The judgment of the Court of Claims of the United States now sought to be reviewed was entered on February 1, 1943. Petitioners' seasonable motion for a new trial was overruled May 3, 1943 (R. 23). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. A. Section 288).

Nature of the Controversy.

This is a proceeding to recover floor stocks taxes paid by the petitioners under the Agricultural Adjustment Act in the amount of $81,784.59 (R. 10), as the result of the invalidation of said Act by this Court in *United States* v. *Butler* (297 U. S. 1).

The Revenue Act of 1936 in Title VII (49 Stat. 1747) made provision for the refund of such taxes but required that the claimant establish, to the extent pertinent hereto, that he bore the burden of such tax, and had not passed it on to the vendee either separately or included within the price of the commodity.

Of the total tax paid by the petitioners, that is $81,784.59, the sum of $3,101.14 was paid on cotton bags (R. 18), and the Court of Claims awarded judgment to the petitioners in that sum. That amount is not in controversy, but the balance of $78,682.45 is. The said balance of $78,682.45 (R. 10) was paid as floor stocks tax on direct-consumption sugar and the Court of Claims decided that the petitioners passed the tax on to its vendees.

The Court of Claims in reaching its decision rejected the finding of fact of the Commissioner who reported on the case, finding that the petitioners realized on the sale of the

sugar $27,110.98 less than the cost of production and the tax (R. 25); even though the record contains a stipulation of Counsel (R. 23) and an exhibit (Pet. Ex. 11, R. 24) supporting the finding of the Commissioner. The opinion of the Court is silent as to the reason for this rejection. We believe the rejected finding to be a material issue to the extent of $27,110.98, of tax burden borne.

The opinion and conclusions of law of the Court below with regard to the entire burden of the tax on sugar are not sustained by the findings of evidentiary or primary facts; but appear instead to be premised on matters not included in the findings of fact that the petitioners believe were incorrectly construed. We believe that the findings of fact made by the Court below show that the judgment in point of law is not sustainable.

Statute Involved.

The pertinent statute is Section 902 of the Revenue Act of 1936 (49 Stat. 1747) and is as follows:

> "No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> "(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such

Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

The Questions Presented.

1. Does a stipulation that the petitioners on the sale of the tax-paid sugar realized a sum $27,110.98 less than the cost of production plus the tax create a material issue requiring a finding of fact to that effect and a judgment in that amount?

2. Do the findings of fact, evidentiary and primary, made by the Court below with respect to sugar require an ultimate finding of fact that the petitioners bore the entire burden of the tax, and *a fortiori* that the failure to grant a judgment for the petitioners is not sustainable in law?

Reasons for Granting the Writ.

1. The Court below—by rejecting the finding of fact made by the Commissioner who reported on the case, the said finding being supported by a stipulation of Counsel, showing that the petitioners realized on the sale of the sugar $27,110.98 less than the cost of production plus the tax—failed to make a finding of fact on a material issue. The

failure to make such a finding, for reasons undisclosed, is reviewable by this Court (28 U. S. C. A. 288(b) as amended May 22, 1939).

2. The rejection of the aforesaid finding of fact, for reasons undisclosed, is in conflict with the decision of the same Court in *Insular Sugar Refining Corporation* v. *United States* (49 F. Supp. 319), wherein the said Court held that such a finding of fact was material, stating at page 323:

> "Unless it shows at least that *it has not recovered its costs plus tax,* it has not sufficiently carried the burden of showing that it itself paid the tax and did not pass it on to its customers." (Italics supplied).

3. The rejection of the aforesaid finding of fact as a material issue is also in conflict with *United States* v. *Will T. Cheek* (126 F. (2d) 1) and *Colonial Milling Co.* v. *Commissioner of Internal Revenue* (132 F. (2d) 505) with regard to which the Court of Claims states in its opinion in *Insular Sugar Refining Corporation* v. *United States* (*supra*) at page 323:

> "It falls short of a showing that the plaintiff did not recover its cost plus tax, which the Circuit Court of Appeals for the Sixth Circuit has held was sufficient to show it had borne the burden.
>
> * * * * * * *
>
> "We are of opinion that, in line with the above cited discussions of the Circuit Court of Appeals for the Sixth Circuit in the Cheek and Colonial Milling Company cases, plaintiff must go this far, at least."

4. The petitioners are informed that Insular Sugar Refining Corporation is filing a petition for a writ of certiorari based on the same principle of fact and law and it is respectfully urged that the failure to grant a writ in the

case at bar would—if the Insular Sugar Refining Corporation is successful—result in a gross denial of justice.

5. The petitioners operate in the Mississippi and Ohio River Valleys territory, and the findings of fact made by the Court below establish the same factors controlling the sale price of the sugar as existed in the case of *United States* v. *Will T. Cheek* (*supra*), who also operated in that territory, and wherein the Sixth Circuit Court of Appeals held the taxpayer bore the entire burden of the floor stocks tax on sugar, stating that:

> "Where the evidence contradicts any real relationship between tax and price increases, that is, indicates that the floor stocks tax was never, in any sense, a factor in determining the sales price of the various articles, the burden of the statute has been adequately met."

A holding to the contrary in the case at bar, even though the findings of fact establish similar conditions in the same competitive territory, creates a conflict between Courts that calls for an exercise of this Court's power of supervision.

6. The findings of fact made by the Court below with regard to the sale of sugar show conclusively that the petitioners sold their sugar in a highly competitive market, where the factors and elements affecting the market price were many and varied, and unaffected by the tax, and such findings show that the denial of an ultimate finding of fact favorable to the petitioners is not sustainable in law (See *United States* v. *Esnault-Pelterie*, 303 U. S. 26).

7. The findings of fact made by the Court below show that in a short period immediately preceding the tax imposing date the price of sugar declined 50 cents per hundred pounds (R. 17), and that on the tax date the price advanced 55 cents per hundred pounds (R. 18). The tax amounted to 53½ cents per hundred pounds (R. 18). It is evident

therefore that a decline in anticipation of the tax, and a restoration of price on the tax effective date to the previous level, does not result in a tax shift and meets the approximation urged by the government in *Anniston Mfg. Co.* v. *Davis* (301 U. S. 337). In the Brief for Respondent (The United States) in that case at page 138, footnote 71, the following appears:

> "Generally, a simple comparison of the sales price before and after the imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption."

That principle is sound and should be applied providing allowance is made for the price decline in the period preceding the tax date because "there was a natural effort to move stocks of sugar into the hands of retailers and customers" (R. 17).

WHEREFORE, your petitioners pray that a writ of certiorari issue to the Court of Claims of the United States, commanding said Court to send to this Court a certified transcript of the record in that Court consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the Court, and such other parts of the record as have been applied for by the petitioner under Rule 99(b) of said Court, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Claims with respect to the floor stocks tax on sugar be reversed, and that the petitioner be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is reported at 48 F. Supp. 647 (R. 18). The petitioners' motion for a new trial was overruled on May 3, 1943, and appears at R. 23.

Jurisdiction.

The judgment of the Court of Claims now sought to be reviewed was entered on February 1, 1943. Petitioners' seasonable motion for a new trial was overruled May 3, 1943.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. A. Sec. 288).

Statement of the Case.

Lawrence M. Williams is Liquidator of Sterling Sugars, Inc., formerly a Louisiana corporation that was succeeded in 1937 by a Delaware corporation of the same name, and the Sterling Sugars Sales Corp. was a selling corporation, first as a subsidiary of the Louisiana corporation and then as a subsidiary of the Delaware Corporation. The Sales corporation sold only the products of its parent corporation. The taxpayer was the Louisiana corporation.

The Louisiana corporation operated plantations in the State of Louisiana for the production of sugarcane, purchased sugarcane and raw sugar, operated a sugarcane factory and a sugar refinery. All of its production was marketed through the sales corporation in the Mississippi Valley territory (R. 15). Sugar is purchased, sold, and shipped in one hundred pound bags and the unit hereinafter referred to is a unit of 100 pounds.

On September 24, 1933, a floor stocks tax was imposed on cotton bags, but that tax is not in controversy as the Court below has awarded judgment to the Louisiana corporation for the full amount of the tax paid on cotton bags, that is $3,101.14 (R. 23).

On June 8, 1934, a floor stocks tax of the equivalent of 53½ cents per hundred pounds was imposed on refined sugar, held for sale as direct-consumption sugar, and the Louisiana corporation paid to the defendant $78,682.45 (R. 10), as tax on 147,070 one-hunderd pound units of refined sugar (R. 10).

This Court in *United States* v. *Butler* (297 U. S. 1) invalidated the tax and Congress in the Revenue Act of 1936, Section 902 (49 Stat. 1747), required that the taxpayer, in order to procure a refund, must establish that it bore the burden of the tax.

The 147,070 one hundred pound units of sugar that the Louisiana corporation had on hand on the taxing date cost $574,131.23, on which it paid a tax of $78,682.45, making a total of $652,813.68, or $4.43880 per unit. The amount realized on sale was $625,702.70, or $4.25446 per unit, which is $27,110.98, or $0.18434 per unit, less than the cost of production and the tax (R. 24). These facts were stipulated by Counsel for the parties and found as a fact by the Commissioner of the Court of Claims who reported to the Court. The Court deleted the finding of the Commissioner from its findings of fact, even though the sole objection to the Commissioner's finding by the Defendant was directed to the materiality and relevancy of the finding (R. 25).

The price of sugar fluctuates. Early in 1933 excess stocks exercised a depressing effect on the market price (R. 16). The market price in January, 1933, was $4.10 (R. 18). The various producing areas endeavored, with the sponsorship of the Department of Agriculture, to negotiate a stabiliza-

tion agreement intended to limit supplies to a point where prices could be held up (R. 16). During these negotiations prices advanced substantially (R. 16), reaching $4.70 in mid-September, 1933 (R. 16). At that time the Secretary of Agriculture declined to approve the agreement and prices started to decline (R. 16). By December, 1933, the price had dropped to $4.30 (R. 16), and on February 11, 1934, three days after the President sent a message to Congress recommending that sugar be made a basic agricultural commodity, the price advanced to $4.50 (R. 17). The President in his message said that "consumers need not and should not bear the tax" (R. 17). Between April 18, 1934, and June 7, 1934 (the day before the tax became effective), prices declined from $4.50 to $4.00 (R. 17). During the 30-day period before June 7, 1934, there was a natural effort to move stocks of sugar into the hands of retailers and customers (R. 17). A 30-day stock of sugar in retailers' hands was exempt from tax and all sugar in the hands of consumers was exempt from tax (Agricultural Adjustment Act Sec. 16(b), 48 Stat. 40). On June 8, 1934, the quoted price of sugar advanced 55 cents (R. 18).

The Louisiana corporation's marketing territory was definitely limited to the Mississippi Valley (R. 15). It sold its sugar at a discount of 10 cents below standard brands of its competitors (R. 15), in an open competitive market at prevailing prices, less the 10 cent discount (R. 15). It produced about one-half of one percent of the sugar consumed in the United States (R. 15). It guaranteed its customers against all price declines, whether of its own or competitors (R. 15). Neither the Sales corporation nor the Louisiana corporation acting through the Sales corporation billed the floor stocks tax as a separate item (R. 15), or otherwise. It maintained large stocks of sugar for long periods of time at Memphis, Tennessee; Louis-

ville, Kentucky; Lexington, Kentucky; Portsmouth, Ohio, and other places (R. 15).

The realization on the sale of the specific sugar on which the floor stocks tax was paid is as follows (Stipulation, R. 23, 24, Pet. Ex. 11):

	Total	Per Unit
Cash Received	$687,446.27	$4.67428
Less: Items included in cash received:		
Freight recovered	30,574.64	0.20789
Premium on small sizes	5,669.94	0.03855
Warehousing & Handling Charges	15,864.27	0.10787
Total	52,108.85	0.35431
Basic Cash Received	635,337.42	4.31997
Less: Brokerage paid	9,634.72	0.06551
Net Amount of Cash Realized	$625,702.70	$4.25446

Specification of Errors.

1. The Court of Claims erred in failing to find that the Louisiana Corporation realized on the sale of the sugar $27,110.98 less than the cost of production and the tax.

2. The Court of Claims erred in rendering a judgment not sustained by the findings of evidentiary or primary facts.

3. The Court of Claims erred in failing to find as an ultimate finding of fact that the special findings of fact it did make establish that the Louisiana corporation bore the entire burden of the tax.

Summary of Argument.

A. The failure to realize cost plus tax on the sale of the product is a material issue and when such a state of facts is stipulated and undisputed, it requires an ultimate finding

of fact and judgment to the extent of the deficiency, that is $27,110.98.

B. The findings of fact that the Court did make establish the fact that both the quoted market price after the taxing date and the amount realized were no more than the price before the tax date, when due consideration is given to the decline in price in anticipation of the tax.

C. That the findings of fact the Court did make establish the fact that the factors determining the price of sugar, are many and varied, episodic in nature, and contradict any real relationship between tax and price changes.

D. A change in price which would have occurred, tax or no tax, cannot be said to reflect a tax shift, as such profit is one the plaintiff would have enjoyed quite as certainly if there never had been any tax.

E. That the findings of fact made by the Court establish the ultimate fact that the Louisiana corporation bore the entire burden of the tax and a judgment to the contrary in point of law is not sustainable.

ARGUMENT.

A. The failure to realize cost plus tax on the sale of the product is a material issue and when such a state of facts is stipulated and undisputed requires an ultimate finding of fact and judgment to the extent of the deficiency, that is $27,110.98.

The facts are undisputed. Counsel, at the hearing before the Commissioner of the Court of Claims, stipulated that the Louisiana corporation realized $27,110.98 less than the cost of production and tax (R. 23, 24, Pet. Ex. 11). The Commissioner in reporting to the Court made a finding in accordance therewith (R. 25). The defendant's only ob-

jection to the finding was on the grounds of relevancy and materiality (R. 25).

The Court in making its Special Findings of Fact omitted the finding of the Commissioner, without disclosing a reason for the omission.

That the failure to realize cost plus tax is a material issue has since been recognized by the same Court in *Insular Sugar Refining Corporation* v. *United States* (49 F. Supp. 319), in no uncertain terms. It not only advances the premise as a material issue and denies relief for failure to prove such fact, but cites the Sixth Circuit Court of Appeals in two cases to the same effect (*United States* v. *Will T. Cheek*, 126 F. (2d) 1; and *Colonial Milling Co.* v. *Commissioner of Internal Revenue*, 132 F. (2d) 505).

The Court of Claims, in discussing this issue and the proof in the *Insular Sugar Refining Corporation* (*supra*) case, said at page 323:

> "It falls short of a showing that the plaintiff did not recover its cost plus tax, which the Circuit Court of Appeals for the Sixth Circuit has held was sufficient to show it had borne the burden.
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> * * * * * * *
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> "Unless it shows at least that *it has not recovered its costs plus tax*, it has not sufficiently carried the burden of showing that it itself paid the tax and did not pass it on to its customers.
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> * * * * * * *
>
> "We are of opinion that, in line with the above cited decisions of the Circuit Court of Appeals for the 6th Circuit in the Cheek and Colonial Milling Company cases, plaintiff must go this far, at least," (Italics supplied.)

Following the decision in *Insular Sugars* (*supra*), the petitioners made a motion for a new trial, showing therein

the application of the *Insular* rationale, but such motion was overruled (R. 23).

A review of the action of the Court below by this Court is sought on two grounds—first, the failure to make a finding of fact on a material issue; and secondly, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

B. The findings of fact that the court did make establish the fact that both the quoted market price after the taxing date, and the amount realized, were no more than the price before the tax date, when due consideration is given to the decline in price in anticipation of the tax.

This Court in *Anniston Mfg. Co.* v. *Davis* (301 U. S. 337), held that Section 902 of the Revenue Act of 1936 did not, on its face, require conditions impossible of proof.

Section 902 reads (49 Stat. 1747):

> "No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> "(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a

tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

The United States in the *Anniston* case (*supra*) in urging the view this Court adopted stated in its brief (page 138):

"Generally, a simple comparison of the sales price before and after the imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption."

The application of that premise requires a judgment for the plaintiffs in the full amount of tax paid.

The Court below found as a fact that in mid-September, 1933, the price was $4.70 (R. 16); that on rejection of the stabilization agreement by the Secretary of Agriculture the price declined to $4.30 (R. 16); that on the call for legislation to accomplish stabilization the price advanced to $4.50 (R. 17); that in anticipation of the tax the price declined to $4.00 (R. 17); that on the imposition of the tax the price advanced 55 cents (R. 18), resulting in a price of $4.55.

The tax amounted to 53½ cents. How is it possible to deduce a price rise from the foregoing findings? At best

it can be said that the tax was discounted during the period of declining price, and, with the removal of the uncertainty, the price returned to its former level.

As far as the plaintiffs are concerned, their realization was only $4.25446 ($625,702.70 divided by 147,070) (R. 24) instead of $4.50, the April 18, 1934 price (R. 17), less 10 cents, less 2%, or $4.3120.

So that, by either method of computation, the price after the taxing date was less than the price before the market began discounting the tax.

C. The findings of fact the court did make establish the fact that the factors determining the price of sugar are many and varied, episodic in nature, and contradict any real relationship between tax and price changes.

The Court below has found the plaintiffs' marketing territory was definitely limited to the Mississippi Valley (R. 15); that it maintained large stocks of sugar at warehouses in Kentucky, Tennessee, and Ohio (R. 15). The plaintiffs therefore operated in the same territory as did the defendant in *United States* v. *Cheek* (*supra*) and the Sixth Circuit in that case found (page 3):

> "The trial court found that appellee sold his sugar in a highly competitive market, where the factors and elements affecting the market price were many and varied, and impossible to determine; and that appellee had borne the burden of the tax, and had not shifted it, directly or indirectly."

The Circuit Court affirmed the trial court, stating:

> "Where the evidence contradicts any real relationship between tax and price increases, that is, indicates that the floor stock tax was never, in any sense, a factor in determining the sales price of the various articles, the burden of the statute has been adequately met."

Not only has the Court below, in the case at bar, found that the Louisiana corporation operated in the territory made the subject of decision, but it has made findings of fact that show the price to be episodic in nature, the factors many and varied, and unrelated to the tax. The Court finds that prices were determined by a number of factors (R. 18)—excess stocks of sugar (R. 18); negotiations to reach a stabilization agreement (R. 18); the disapproval of such agreement (R. 18); the President's message (R. 17); the natural effort to move stocks in the 30 days before the tax date (R. 17), and the fact that prices after the tax were no higher than they were from February 11, 1934 to April 18, 1934 (R. 17), clearly establishes that there is no relationship between tax and price changes.

D. A change in price which would have occurred, tax or no tax, cannot be said to reflect a tax shift, as such profit is one the plaintiffs would have enjoyed quite as certainly if there never had been any tax.

So, in substance, says the Second Circuit Court of Appeals in *E. Regensburg & Sons* v. *Helvering* (130 F. (2d) 507, at 510), speaking of reduction in cost:

> "A fall in the price of the raw material which would have occurred, tax or no tax, is not such an indemnity; the claimant's loss through the tax cannot be said to have been made good by a profit which he would have enjoyed quite as certainly, if there never had been any tax. Indeed, to so construe the act would expose it to some of those constitutional dangers which the opinion in Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 143, was at pains to show that it must avoid."

and speaking of sales price the Court said:

> "• • • when the increase in 'gross sales value' is not owing to the claimant's raising his selling price,

> but to some economy in manufacture disconnected with the tax, or an accident over which he has no control, there is no reason to deny him the same right to count it in absorbing the spread between 'margins'; which he has as to a decrease in the cost of the commodity."

The findings of fact made by the Court below and hereinabove summarized clearly show that excepting for the decline during the period immediately before the tax in a natural effort to move stocks, the Louisiana corporation would have received the same price for its sugar that it did receive after paying the tax.

E. The findings of facts made by the court establish the ultimate fact that the Louisiana Corporation bore the entire burden of the tax and a judgment to the contrary in point of law is not sustainable.

The findings of fact made by the Court below require an ultimate finding that the Louisiana corporation has established that it bore the entire burden of the tax; and the judgment to the contrary is not sustainable in point of law.

Conclusion.

It is submitted that it is appropriate for this Court to decide what constitutes proof of bearing the burden of the tax; that the instant case involves facts and circumstances peculiarly fitting to such purpose, and that the writ should issue as prayed.

Respectfully submitted,

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 194

LAWRENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, STERLING SUGARS SALES CORP., AND STERLING SUGARS, INC., A DELAWARE CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 18–23) is reported in 48 F. Supp. 647.

JURISDICTION

The judgment of the Court of Claims was entered February 1, 1943 (R. 23). On March 30, 1943, a motion for a new trial was filed which

was overruled on May 3, 1943 (R. 23). The petition for writ of certiorari was filed July 23, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the proof in the court below was sufficient to establish that the taxpayer bore the burden of the floor stocks taxes involved and has not shifted that burden directly or indirectly within the meaning of Section 902 of the Revenue Act of 1936.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9–13.

STATEMENT

The special findings of fact of the Court of Claims (R. 9–18) may be summarized as follows:

Petitioner is liquidator of Sterling Sugars, Inc., formerly a Louisiana corporation, which was organized in 1921, and which was actively engaged in business until its dissolution in 1937 (R. 9). This Louisiana corporation was succeeded in 1937 by Sterling Sugars, Inc., a Delaware corporation, which took over all of its assets and assumed all of its liabilities (R. 9–10).

The Louisiana corporation operated plantations for the production of sugarcane in Louisiana and

also owned and operated a sugarcane grinding factory and a sugar refinery in that state. The Sterling Sugars Sales Corporation, which was organized in 1933 by the Louisiana corporation, acted as a sales conduit for the products of the Louisiana corporation, and was not liable for, and did not pay, the floor stocks tax here involved. (R. 10.)

The Louisiana corporation filed returns and paid the floor stocks tax on 147,070 one hundred-pound units of granulated or direct-consumption sugar. A small amount of the tax so paid was refunded, leaving a net amount paid of $81,783.59. (R. 10.)

On June 29, 1937, a claim for refund was filed by Sterling Sugars, Inc. In connection with correspondence between the Commissioner and representatives of the Sterling Sugars, Inc., in regard to this claim for refund, the following statement appears in a letter dated January 12, 1938, signed by the secretary of Sterling Sugars, Inc. (R. 11–12):

> Tax paid on floor stock in June, July, and August 1934, all of which was collected.

This claim for refund was rejected by the Commissioner of Internal Revenue by letter dated August 17, 1940 (R. 13–14).

The floor stocks tax on the cotton content of the bags used as containers for the sugar, imposed August 1, 1933, under the Agricultural Adjustment Act of May 12, 1933, was paid by the

Louisiana corporation on September 14, 1933 (R. 14). The Court of Claims has found that, with respect to the tax paid on the cotton content of bags, in the amount of $3,101.14, the Louisiana corporation bore the entire burden of this tax (R. 18).

The rate of floor stocks tax on sugar held for sale June 8, 1934, was based on "pounds of raw value" which, reflected in pounds of refined sugar, was 53½ cents per hundred pounds. (R. 14.)

The Louisiana corporation produced the 147,070 one hundred-pound units of granulated or refined sugar on hand June 8, 1934, at varying dates from December 1932 to June 8, 1934. All costs in the manufacture of such refined sugar had been incurred by that date. (R. 14.)

Neither the Sales corporation, nor the Louisiana corporation acting through the Sales corporation, billed the floor stocks tax as a separate item (R. 15). About the middle of September 1933, the price of refined sugar was $4.70 per unit of one hundred pounds. Due to conditions in the sugar market during the period from that time to December 19, 1933, it declined to $4.30. On February 11, 1934, the price advanced from $4.30 to $4.50 and remained at this level until April 18, 1934. (R. 16–17.) By the first week of June 1934, the price of refined sugar reached a low of $4.10 per one hundred pounds. On June 8, 1934, the date the tax of 53½ cents became effective, refined sugar prices increased 55 cents per one hundred

pounds, which was an increase due to and to cover the newly imposed tax. (R. 18.)

The Louisiana corporation made no refunds of the tax to its vendees after the tax was invalidated January 6, 1936, or at any other time (R. 18).

Upon the foregoing findings of fact the Court of Claims held that the petitioner was not entitled to recover the floor stocks tax on the sugar, since the tax had been passed on to the vendees. As to the cotton bags, it held that petitioner was entitled to recover the sum of $3,101.14, and rendered judgment accordingly. (R. 22–23.)

ARGUMENT

On the day the floor stocks tax went into effect on refined sugar, the taxpayer (for convenience the term "taxpayer" is used hereinafter to describe either the Louisiana corporation, the Delaware corporation, or the petitioner as liquidator) advanced the prices of its sugar on account of the tax and to cover it. This fact has been held by a number of the courts to show *prima facie* that the burden of the tax has been passed on to the purchasers. *Honorbilt Products, Inc.* v. *Commissioner,* 119 F. 2d 797 (C. C. A. 3d); *United States* v. *H. T. Poindexter & Sons Mer. Co.,* 128 F. 2d 992 (C. C. A. 8th), certiorari denied, 317 U. S. 677; *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505 (C. C. A. 6th), certiorari denied, April 5, 1943, No. 782, October Term, 1943.

In addition to this fact the taxpayer here in correspondence with the Commissioner of Internal Revenue referred to the fact that it had "collected" the tax and in its invoices it made a notation that the price included the tax (R. 21). Either the increase in price to cover the tax or the notation to the customers that the price included the tax would be sufficient to establish that the taxpayer had passed the burden of the tax on to its vendees. The two facts taken together are, it would seem, conclusive.

The petition for certiorari is based mainly upon the contention that since the taxpayer did not recover cost plus tax[1] it has established that it bore the burden of the tax. The failure of the court below to make a finding on this does not furnish grounds for certiorari, since in the instant case such a fact is of no significance and would not change the ultimate finding of the court below. In the few cases which have allowed recovery under such circumstances the price increase was not occasioned by the imposition of the tax, but by other factors. In *United States* v. *Cheek,* 126 F. 2d 1 (C. C. A. 6th), the finding was that the factors and elements affecting the market price were many and varied and impossible to determine. Here it has been found that a price increase was made to cover the newly imposed tax (R. 18).

[1] This was stipulated, but respondent at all times asserted it is irrelevant and immaterial (R. 25).

The fact that in *Insular Sugar Refining Corp.* v. *United States,* 49 F. Supp. 319 (C. Cls.), pending on petition for certiorari, No. 225, October Term, 1943, and *Colonial Milling Co.* v. *Commissioner, supra,* the courts stated, as a minimum requirement, that the taxpayer must show that it has not recovered its cost, plus tax, does not carry the connotation, as petitioner assumes, that such a showing will suffice, notwithstanding any other evidence.

Cases of this kind necessarily turn upon the particular facts involved and no basis for certiorari is shown by the circumstances that different results were reached upon different facts. The conclusion of the court below that the taxpayer had not established that it bore the burden of the tax is amply supported by the other undisputed facts already set forth, and it was unnecessary to make the finding requested that the taxpayer had realized a sum less than the cost of production plus the tax.

Should the petition be granted, respondent would support the decision upon an additional ground which the court below rejected. The claim or claims relied upon did not present sufficient data to enable the Commissioner to make any determination as to whether the taxpayer bore the burden of the tax and did not meet the requirements of Article 202 of Treasury Regulations 96 (Appendix, *infra*). *Cf. Lee Wilson &*

Co. v. *Commissioner*, 111 F. 2d 313 (C. C. A. 8th), and *Tennessee Consolidated C. Co.* v. *Commissioner*, 117 F. 2d 452 (C. C. A. 6th).

CONCLUSION

The decision of the court below is clearly correct. No conflict of decisions has been shown and the petition should be denied.

Respectfully submitted.

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AUGUST 1943.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such com-

modity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(U. S. C., Title 7, Sec. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

(U. S. C., Title 7, Sec. 645.)

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and inserting in lieu thereof "January 1, 1940".

(U. S. C., Title 7, Sec. 645.)

Treasury Regulations 86 (1936 ed.):

CHAPTER II

* * * * *

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 203. *Period of limitations for filing claims.*—No refund shall be made or allowed of any amount paid as tax unless a claim for such refund is filed by the person entitled thereto, or his duly authorized

agent or representative, subsequent to June 22, 1936, and prior to July 1, 1937.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

* * * * *

CHAPTER III

ARTICLE 301. *Claim form prescribed.*—Claims for refund of amounts paid as floor stocks tax shall be filed on P. T. Form 76. (See Chapter II for general provisions relating to all claims.)

ART. 302. *Limitation as to number of claims.*—Only one claim shall be filed by any person for refund of floor stocks taxes. The claimant shall include in such claim the total amount of refund claimed with respect to the total amount of all floor stocks taxes paid by him.

If the claimant paid floor stocks tax with respect to more than one commodity, the total amount of refund claimed out of the total floor stocks taxes paid with respect to all commodities shall, nevertheless, be set forth in one claim. For example, if the

claimant paid the cotton floor stocks tax, the wheat floor stocks tax, and the tobacco floor stocks tax, he shall include in one claim the total amount of the refund sought out of the total amount of floor stocks taxes paid by him with respect to cotton articles, wheat articles, and tobacco articles, and shall not file three separate claims.

* * * * *

ART. 305. *Facts and evidence respecting tax burden.*—If the claim involves floor stocks taxes paid with respect to more than one commodity, the facts and evidence as to the amount of tax burden borne with respect to articles made from each such commodity shall be set out separately; e. g., if the claim is for refund of amounts paid as cotton floor stocks tax and as wheat floor stocks tax, the facts and evidence concerning the tax burden with respect to cotton articles shall be set forth separately from the like facts and evidence with respect to wheat articles. (See article 202.)

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